United Nations AT/DEC/1136

Administrative Tribunal

Distr.: Limited
30 September 2003
English
Original: French

ADMINISTRATIVE TRIBUNAL

Judgement No. 1136

Case No. 1217: SABET & SKELDON Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Brigitte Stern;

Whereas, at the request of Mary Sabet and Grania Skeldon, staff member and former staff member respectively of the Economic and Social Commission for Asia and the Pacific, hereinafter referred to as ESCAP, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit in which to file an application until 30 September 2001;

Whereas on 27 September 2001, the Applicants filed an application in which they requested the Tribunal:

"1. ...

(a) [To find] that by failing for more than 16 years to carry out the complete classification procedure in respect of two posts in the Editorial Services, ESCAP, the Administration had contravened the mandate of the General Assembly and the applicable Staff Regulations of the United Nations ...

(b) [To find] that by failing to make appropriate provision to implement the official classification levels approved by the Classification Section of the Office of Personnel Services [now Office of Human Resources Management], the Administration had denied the Applicants the protection of their conditions of service;

04-27386 (E) 300304

(c) [To find] that by disregarding the unanimous recommendation of the Joint Appeals Board, the Administration ... had further denied the Applicants due process.

2. ...

(a) [To order] that the Applicants be promoted retroactively from the dates when they had completed the minimum required periods of service in grade, as if the posts they were encumbering had been regularly classified from the beginning, and that they be granted appropriate steps of seniority ...

(b) [To order] that the Administration compensate the Applicants with the difference in net base salary between what they actually received and what they would have received if they had been promoted on the dates indicated above, including the actuarial equivalent of loss in pension and other ancillary benefits ...

(c) [To order] that in addition to the three months compensation approved by the Secretary-General for the delay ..., the Applicants should be awarded compensation in the amount of two years net base salary ..."

Whereas at the request of the Respondent, the President of the Tribunal extended the time-limit for the Respondent to file his answer until 31 January 2002 and then 31 March 2002;

Whereas the Respondent filed his answer on 12 March 2002;

Whereas the Applicants submitted written observations on 15 April 2002;

Whereas the facts in Applicant Sabet's case are as follows:

Applicant Sabet entered the service of the Organization on 7 February 1983, on a fixed-term appointment of two months and 20 days as editor at the P-3 level with the Conference Services Section, Economic Commission for Western Asia (ECWA), in Iraq. At the time of the facts which gave rise to the present application she occupied the post of Chief, Editorial Services Section (ESS) at ESCAP in Bangkok and had a permanent contract.

In June 1982, the ESCAP Administration submitted a request for classification of the post of Chief of Editorial Services at ESCAP, which was then at the P-4 level. On 24 May 1983, the Assistant Secretary-General, Office of Personnel Services, approved the classification of that post at the P-5 level. ESCAP submitted requests for the budgetary reclassification of the two posts in question in every biennium budget from 1986-1987 until 2000-2001, save the biennium 1998-1999. On 1 March 1991, the Applicant was promoted to the P-4 level against the post of Chief, Editorial Services, which was still at the P-4 level in the budget.

Between 28 November 1996 and 15 September 1997, the Applicant wrote several times to the Executive Secretary of ESCAP and to the Chief, Division of Administration, ESCAP, drawing their attention to the "lack of congruence since 1983 between the classified and budgetary levels of [her post and that of Applicant Skeldon] in the Editorial Services Section" and pointing out that "financial considerations or the prospect of negative action by the General Assembly do not constitute sufficient justification for refusing to implement a classification decision" requesting that the reclassification be given retroactively with effect from 1 March 1991.

On 27 October 1997, the Applicant wrote to the Secretary-General requesting a review of the administrative decision not to implement the classification decision in respect of her post.

On 9 January 1998, the Applicant filed a statement of appeal with the Joint Appeals Board.

Following the request for budgetary reclassification of the post submitted in the biennium 2000-2001, the post of Chief, ESS, at ESCAP was included at the P-5 level in the programme budget for the biennium 2000-2001. On 1 April 2000, the Applicant was promoted to the P-5 level. She also received a special post allowance for the period from 1 January to 30 April 2000.

Whereas the facts in Applicant Skeldon's case are as follows:

The Applicant entered the service of the Organization on 7 September 1967, on a four-month fixed-term contract at the P-2 level, as English editor in the Office of Conference Services, at Headquarters. Her service was interrupted from 1973 to 1980 and from 1982 to 1995. At the time of the facts that gave rise to the present application, she had a fixed-term appointment at the P-3 level as English editor in the Editorial Services Section at ESCAP.

In November 1983, the ESCAP Administration submitted a request for classification of the post of Editor, ESS/ESCAP, which was then at the P-3 level. On 29 November 1983, the Assistant Secretary-General, Office of Personnel Services, approved the classification of the post of Editor at the P-4 level. ESCAP submitted requests for the budgetary reclassification of the two posts in question in every biennium budget from 1986-1987 until 2000-2001, save the biennium 1998-1999.

Following her second interruption of service, the Applicant re-entered the service of ESCAP on 1 December 1995, as Editor at the P-3 level. Between 29 November 1996 and 15 September 1997, she wrote several times to the Executive Secretary of ESCAP and the Chief, Division of Administration, ESCAP, requesting that the funds necessary for effective implementation of the reclassification of her post be released and that the emoluments she was owed since she took up the functions of the post be paid in full.

On 30 October 1997, the Applicant filed a statement of appeal with the Joint Appeals Board.

Following the request for budgetary reclassification of the post submitted in the biennium 2000-2001, a P-4 post was transferred to ESS/ESCAP. On 1 April 2000, the Applicant was promoted to the P-4 level against that post. She also received a special post allowance for the period from 1 January to 30 April 2000.

The Joint Appeals Board adopted its report on the two cases on 19 December 2000. Its findings and recommendations included the following:

"**Considerations**

...

30. As the two appeals were identical in substance, the Panel decided to consolidate them and deal with them in a single report.

...

32. The basic facts of the present case were not in dispute ...

33. However, it was not clear as to why it took approximately 14 years, from the time when the two posts were confirmed at their reclassified levels, for the budgetary reclassification of those posts to be approved. ... It should be noted that PPBD had rejected not just one, but six biennium requests from ESCAP to reclassify the Appellants' posts. In the view of the Panel, the Respondent's reply was far from adequate. ...

34. The Panel also observed that during those 14 years at least four posts within ESCAP had been successfully reclassified through either redeployment of posts within ESCAP (three cases) or regular budget process (one case). ... Those cases, which the Respondent did not deny, it was felt, considerably weakened the Respondent's main argument that financial constraints had prevented the two posts from being budgetarily reclassified.

35. In the opinion of the Panel, even if financial constraints had been the principal factor, 14 years of delay were still too long and too unfair to the staff members directly concerned. Such a lengthy delay in budgetarily reclassifying those posts deprived the staff members of the protection of the conditions of service ...

36. As a result of the continuing failure of the Administration to provide for the reclassification of their posts, the Appellants were performing at the clearly higher level functions for approximately nine years in Ms. Sabet's case and approximately four and a half years in Ms. Skeldon's case, without adequate recognition or commensurate compensation. It created a totally inequitable situation for the Appellants. Moreover, it violated the principle of 'equal pay for equal work'.

37. In light of the foregoing, the Panel *unanimously recommends* that the Appellants be promoted to the P-5 and P-4 levels respectively after they completed the minimum required periods of services in grade, as if the two posts had been regularly reclassified from the beginning, [and that their seniority be adjusted accordingly].

...

40. The Panel noted the Appellants' other damage claims for the delay in processing their inquiries and their appeals, but felt uncomfortable, in the absence of guideline, to suggest the reward as requested. It was not sure if the said delay had caused actual injury to the Appellants' rights as staff members. However, this did not mean that, in not recommending other monetary compensation the Panel felt any less strongly about the nature of the grievances and the seriousness of the breach of the Appellants' conditions of service.

..."

On 10 July 2001, under cover of separate letters, the Under-Secretary-General for Management transmitted to the Applicants copies of the JAB report and advised them as follows:

"The Secretary-General considers that, even if a [P-5 post for Ms. Sabet, P-4 post for Ms. Skeldon] had been included earlier in the programme budget and the General Assembly's approval for such a post had been obtained, it does not necessarily follow that you would have been automatically promoted to that post. In accordance with the Tribunal's jurisprudence, the classification of a particular post is altogether different from the promotion of its incumbent, whose promotion to the higher level depends on the outcome of the regular review process.

"In considering the Board's recommendation that you should be compensated for the higher-level functions you performed, the Secretary-General observes that the decision to compensate staff for performing higher-level functions is discretionary and subject to the availability of a post. In the absence of an available post in this case, there is no abuse of discretion in deciding not to pay such compensation. Moreover, paragraph 10 of administrative instruction ST/AI/277 [dated 10 November 1980] on 'Classification System for Professional Posts', which is applicable to this case, provides that, in the context of an upward post reclassification, a staff member will be placed on that post at the previous, lower grade 'until the new grade is approved through the budget submission to the General Assembly'.

> "In light of the above considerations, the Secretary-General cannot accept the Board's recommendation for compensation. However, taking into account the totality of circumstances in this case, the Secretary-General agrees with the Board that the Administration was obligated to find a timely solution to the discrepancy between the level of the functions and the budgetary level of the post. Acknowledging the delay in resolving your case, he has decided that you should be compensated in the amount of three months net base salary."

On 27 September 2001, the Applicants filed with the Tribunal the application mentioned above.

Whereas the Applicants' principal contentions are:

1. The Secretary-General's decision to reject the unanimous recommendation of the Joint Appeals Board demonstrated indifference to the facts and a blatant disregard for the established appeals mechanism.

2. By choosing not to exercise his discretionary power to make provision for timely implementation of the official classification levels of the Applicants' posts through regular budgetary or other means, as he had done for other ESCAP posts, the Respondent had acted in an arbitrary and inequitable manner and had violated the principle of "equal pay for equal work".

3. The Administration's position contravened the mandate given by the General Assembly and the principles underlying the introduction of a system of classification in the Organization.

4. The Administration had acknowledged the delay in resolving the Applicants' cases but the compensation granted was not sufficient to repair the financial and personal losses the Applicants had suffered.

Whereas the Respondent's main arguments are:

1. The Applicants had no right to promotion, a fortiori to retroactive promotion. The reclassification of a post does not create any right or expectancy of promotion.

2. Had the posts been funded in 1983, the Applicants may not have been eligible for those posts. Even if additional funds had been budgeted subsequent to the Applicants' incumbency, the Applicants would have been subject to a regular promotion review process, the outcome of which could not be anticipated with certainty.

3. The inability to provide budgetary support for the Applicants' posts was not improperly motivated.

4. The award of compensation at a higher level is discretionary and the Applicants had no right to such compensation.

The Tribunal, having deliberated from 1 to 25 July 2003, now pronounces the following judgement:

I. The pattern of behaviour of the Administration with respect to the two Applicants whose cases are joined is similar and the two applications allege the same malfunctions of the post classification procedure in ESCAP.

An exercise for the classification of the post of Chief, ESS/ESCAP, which was then at the P-4 level and was encumbered, at the time of the events giving rise to this application, by the Applicant Sabet, began in June 1982 and resulted in the classification of the post at the P-5 level, which was approved by the Administration on 24 May 1983. The classification was confirmed in 1986.

Similarly, an exercise for the classification of the post of Editor, ESS/ESCAP, which was then at the P-3 level and was encumbered, at the time of the events giving rise to this application, by the Applicant Skeldon, began in November 1983 and resulted in the classification of the post at the P-4 level, which was approved by the Administration on 29 November 1983. This classification was also confirmed in 1986.

ESCAP requested funds in order to classify the two posts in question at the levels that had been determined in all the biennium budgets, beginning with the 1986-1987 budget, and repeating the request at the time of preparation of each budget up to that of 2000-2001, except for the 1989-1999 budget.

II. The Tribunal, before analysing the facts of this case, wishes to reaffirm that the classification of posts and the promotion of the incumbents of the posts are two different things, even though they are interdependent, and that these two operations must comply with the principles stated in the Staff Regulations, regulation 2.1 of which provides:

> "In conformity with principles laid down by the General Assembly, the Secretary-General shall make appropriate provision for the classification of posts and staff according to the nature of the duties and responsibilities required."

The role of the Tribunal is to verify that the Administration does not violate the conditions of service of the members of the staff of the United Nations, and the scope of such verification varies depending on the Secretary-General's freedom of action.

III. On the subject of the classification of posts, the Tribunal recalls, as it did in *Moser* (Judgement No. 388 (1987), para. XIV) that the classification of the posts of staff members is part of their conditions of service.

The Tribunal also recalls, in connection with the implementation of the prerogatives of the Secretary-General, what it affirmed in its Judgement No. 541, *Ibarria* (1991), which was based on Judgement No. 396, *Waldegrave* (1987), namely that it cannot substitute its own judgement for that of the Secretary-General in post classification matters. What the Tribunal must do is merely to consider whether there has been a material error in procedure or substance or some other significant flaw in the decision complained of (see *Ibarria*, ibid.). In fact, the issue here is not a challenge to a classification but merely an application claiming that a classification that was made was not implemented in accordance with the rules in force. It is clearly part of the Tribunal's terms of reference to ensure that classification procedures are respected.

IV. On the question of the promotion of staff members, the Tribunal has similarly taken the view that the rules and procedures concerning promotions are part of the conditions of service of staff members. This was stated with particular clarity in *Bentaleb* (Judgement No. 539 (1991), para. II):

> "While recognizing the principle that promotions are subject to the discretion of the Secretary-General, the Tribunal has also considered that the rules and procedures regulating the promotion process contain safeguards to ensure fairness and objectivity in a process which is vital to staff members. Accordingly, the Tribunal has stressed that these rules and procedures are part of the conditions of service of staff members and should therefore be respected, correctly interpreted and properly applied."

With respect to the scope of its review of the promotion process, the Tribunal has consistently stated that it leaves a degree of freedom of action to the Secretary-General but verifies that there has been no abuse in the exercise of discretionary authority (Judgements No. 1031, *Klein* (2001); and No. 1056, *Katz* (2002)). Thus, the Tribunal has frequently acknowledged that a staff member of the United Nations has no automatic right to be promoted after a certain number of years and that it cannot substitute its own judgement for that of the Administration with respect to the standards of performance or efficiency of a staff member; however, it has just as often considered that officials had been arbitrarily deprived of their right to be considered for promotion and even, in certain specific cases, that they had a real legal expectancy of promotion which had been infringed. Thus, in *Kumar* (Judgement No. 470 (1989), para. IV) the Tribunal stated that:

> "... it cannot substitute its judgement for that of the Administration concerning the standard of performance or efficiency of a staff member. However, the Tribunal is competent to pass judgement upon applications alleging non-observance of pertinent regulations and rules or alleging prejudice or improper motivation."

V. The Tribunal will therefore consider in succession in the light of the general principles under which it exercise its power of review — which have just been summarized above — the manner in which the classification of the posts was carried out and the way in which the promotion of the two Applicants was handled, without confusing these two issues.

VI. This, however, is what the Respondent is seeking to do. The first argument of the Respondent in the case is that "[t]he applicants had no right to promotion, a fortiori to retroactive promotion. The reclassification of a post does not create any right or expectancy of promotion". But in putting forward this argument from the very outset of the legal arguments submitted in the answer, the Administration confuses two issues between which the Tribunal has already had occasion to make a clear distinction, which it is therefore bound to repeat (see Judgement No. 388, *Moser* (1987), para. I):

> "The Respondent argues that staff members in General Service posts have no such right, inter alia, relying heavily on the notion that in seeking reclassification, the Applicant was, in reality, demanding a promotion and that since no staff member has a right to a promotion, the Applicant had no right to reclassification.

> "The Tribunal holds in this respect that the classification of a particular post is altogether different from the promotion of its incumbent. The classification of each post depends on the nature of the duties and responsibilities assigned to it and not on the personal qualifications, experience or performance of the incumbent. Therefore, posts should be classified according to their respective job descriptions, which must be presumed to set forth accurately the nature of the duties and responsibilities of the job. Classification refers to the task to be performed by the incumbent of a given post; promotion is, in principle, connected to the way that task is performed, and takes into consideration performance evaluation reports.
>
> "As a consequence, the non-existence of a right to promotion for staff members is irrelevant as far as post classification is concerned."

VII. The Tribunal will therefore begin by considering the way in which the Administration proceeded in order to give effect to the classification decisions adopted in 1983, confirmed in 1986 and implemented only in 2001, 18 years later.

VIII. The two Applicants maintain that "the non-implementation of the budgetary classification of the two posts was a breach of the United Nations own policy and principles as well as the principle of equal pay for equal work". The Respondent for his part, states in the answer, by way of justification for the failure to finalize the classification process, that it had not been possible to obtain the necessary funds:

> "Additional budgeting has been requested for the Applicants' posts, but had not been granted ... ESCAP made consistent efforts to obtain such budgetary support, but was unsuccessful ... The decision not to supply such budgetary support was a financial decision taken by the Organization, in the light of financial constraints facing the Organization at the time, and more particularly those facing ESCAP."

IX. The Tribunal considers, in the first place, that the Administration is wrong in claiming that it made the necessary efforts in good faith to secure budgeting for the reclassified posts and fully shares the analysis of the Joint Appeals Board to the effect that no reasonable explanation was given for the 14 years' delay in implementing the classification, a calculation which was, moreover, made by the Board from the date of confirmation of the classification and not from the initial classification:

> "However, it was not clear as to why it took approximately 14 years, from the time when the two posts were confirmed at their reclassified levels, for the budgetary reclassification of those posts to be approved. The Respondent in [his] Reply stated that PPBD had decided not to include the requests for reclassification of the two posts in the Secretary-General's budget proposals.

> However, [he] did not give reasons for the PPBD's rejections. It should be noted that PPBD had rejected not just one, but six biennium requests from ESCAP to reclassify the Appellants' posts. In the view of the Panel, the Respondent's reply was far from adequate. The Panel believed that the staff members concerned and the Panel were owed an explanation as to why the reclassification requests for those two posts had been repeatedly rejected. It believed that 14 years were too long. It was disheartened by the lack of any response to the Appellants' inquiries. During its deliberations, the Panel gave the Respondent another opportunity for clarification, but did not think that the information provided by the Respondent shed much light on that issue."

Similarly, the Tribunal has received no satisfactory additional explanations for the failure to implement the budgetary reclassification.

X. Moreover, it considers that the conduct of the Administration was all the more arbitrary in that other posts were classified during the period concerned, as also noted by the Joint Appeals Board:

> "The Panel also observed that during those 14 years at least four posts within ESCAP had been successfully reclassified through either redeployment of posts within ESCAP (three cases) or regular budget process (one case) ... Those cases, which the Respondent did not deny, it was felt, considerably weakened the Respondent's main argument that financial constraints had prevented the two posts from being budgetarily reclassified. If it had indeed been plagued by financial woes, the Administration would not have been in a position to implement any classification within ESCAP during the relevant period."

XI. However, even assuming that the Administration had made the necessary efforts, merely to tell the Applicants: "We cannot remunerate your work respectively at the P-5 and P-4 levels because we only have enough money to pay you respectively at the P-4 and P-3 levels" is incompatible with the principle of equal pay for equal work.

Since the Administration alleged budgetary reasons which it regarded as justification for its failure to implement the budgetary classification of the Applicants year after year, the Tribunal wishes to point out that budgetary arguments cannot systematically be considered as an excuse for not granting officials the rights to which they are entitled. In Judgement No. 857, *Daly & Opperman* (1997), paragraphs III and V, the Tribunal clearly indicated the limits of the discretionary authority of the Administration in giving effect to the classification of posts:

> "The Respondent argues that a recommendation by the CCS [Compensation and Classification Service] that a post be upgraded is not a sufficient condition for its reclassification even when a post at a higher level is available. The appropriate resources must be available before the post is reclassified, pursuant to a classification notice by the CCS. The Tribunal cannot accept this contention. The lack of budgetary funds as a justification for non-implementation of the classification of the Applicants' posts is not acceptable in the light of the special circumstances of this case ...
>
> "...
>
> "The Tribunal must decide whether the Applicants were accorded due process in the determination of their case and whether it is within the Secretary-General's discretion to refuse the Applicants equal pay for equal work and responsibilities at the G-7 level, which the Administration recognized as their appropriate level. The Tribunal believes that while the Secretary-General's discretion is not limited, it must be exercised on a non-discriminatory and non-arbitrary basis. In invoking the budgetary argument as a reason for failing to implement the classification of the Applicants' posts, while implementing the upgrading of 28 other posts, the Administration behaved in an arbitrary manner."

XII. The Tribunal will consider the argument of the Respondent who regards this precedent as irrelevant stating, without the least explanation, that "the situation in the present case is not comparable". For its part, the Tribunal fully agrees on this point with the Joint Appeals Board which took the view that, on the contrary, the precedent was fully applicable to this case:

> "In the opinion of the Panel, even if financial constraints had been the principal factor, 14 years of delay were still too long and too unfair to the staff members directly concerned. Such a lengthy delay in budgetarily reclassifying those posts deprived the staff members of the protection of the conditions of service. The Panel felt that the present case was similar to *Daly & Opperman*, in the sense that certain posts were classified and other posts were not classified during the same period of time. It also felt that the conclusions reached by the Administrative Tribunal in *Daly & Opperman* were dispositive of the present case."

In the view of the Tribunal it is, indeed, fully applicable to this case as clearly emerges from the terms it used in *Daly & Opperman*, paragraph III:

> "The Respondent argues that a recommendation by the CCS [Compensation and Classification Service] that a post be upgraded is not a sufficient condition for its reclassification even when a post at a higher level is available. The appropriate resources must be available before the post is reclassified, pursuant to a classification notice by the CCS. The Tribunal cannot accept this contention. The lack of budgetary funds as a justification for non-implementation of the classification of the Applicants' posts is not acceptable

> in the light of the special circumstances of this case. The budgetary provisions for upgrading these posts from the G-6 to the G-7 level involved an insignificant sum of money when viewed against the total biennial programme budget of the United Nations Secretariat."

In *Daly & Opperman*, it was a question of the reclassification of two posts, just as in the present case it is a question of the classification of only two posts, which, in the context of the United Nations budget, is insignificant. The Applicants moreover emphasize the modest financial implications of the reclassification.

The Tribunal wishes to reaffirm that **the budgetary argument cannot nullify a classification decision within a reasonable time frame** as also indicated by the Tribunal in *Daly & Opperman*, paragraph IV:

> "The Tribunal agrees with the Applicants' submission that once the special mechanism to remove the anomalies found in the DHL [Dag Hammarskjöld Library] was put into place, as mandated by the General Assembly, **the Secretary-General was under a legal obligation to implement the CCS [Compensation and Classification Service] decision without undue delay**" (emphasis added by the Tribunal).

The purpose of the ESCAP classification exercise, like that of the United Nations library, was to put an end to anomalies resulting from the classification of posts at the wrong level, and the situation is therefore comparable on all counts. In not carrying through the classification to its conclusion, the Administration failed to fulfil the obligations that are incumbent on the Secretary-General under the resolutions of the United Nations, particularly resolution 35/214 of 17 August 1980:

> "*The General Assembly,*
>
> "...
>
> "*Invites* the Commission, the Secretary-General and the heads of the organizations which have accepted the Commission's statute to cooperate fully in the implementation of the common standards of job classification established by the Commission, ensuring appropriate consideration of the individual situation and requirements of each organization and the most economical use of resources."

XIII. In concluding its consideration of the classification procedure, the Tribunal must therefore decide in this case whether the two Applicants were accorded due process in the determination of their case and whether it was within the Secretary-General's discretion to refuse to classify their posts at P-5 and P-4, respectively, which the Administration had long recognized as being the level to which they were

entitled. The Tribunal considers that to allege budgetary reasons in order not to implement the classification of a post, implies replacing the principle set forth in regulation 2.1 of the Staff Regulations by the principle that the duties of staff members should be carried out at the lowest possible cost. The Tribunal considers that by invoking the budgetary argument in order not to give effect to the classification of the posts of the two Applicants for 16 years, the Administration behaved in an arbitrary manner.

XIV. The Tribunal will next consider the failure to promote the two Applicants for the whole of that period. They both consider that they did not receive the promotions they were entitled to expect because the process of classifying their posts had not been finalized. The Respondent, for his part, maintains that, even if the posts had been correctly classified, that would not have changed the situation of the Applicants:

> "Even if additional funds had been budgeted subsequent to the Applicants' incumbency, the Applicants would have been subject to a regular promotion review process, the outcome of which could not be anticipated with certainty."

XV. The Tribunal will first consider the way in which the Administration treated the two Applicants following their innumerable letters, claims and appeals. The Tribunal notes that the situation of the Applicants changed somewhat following the decision of the Joint Appeals Board adopted on 5 February 2001. On the one hand, on 25 June 2001, the Secretary-General informed the Applicants that he was granting them a special post allowance for four months from 1 January 2000 to 30 April 2000 as compensation for the fact that prior to 1 May 2000 the Applicants had been performing duties corresponding, respectively, to a P-5 and a P-4 post, although they were paid, respectively, at grades P-4 and P-3. Thus, the Administration granted the Applicants a three-month salary differential even though it had benefited from their work at a level higher than that of their remuneration for 49 months (from 1 March 1996 to 1 January 2000) in the case of the Applicant Sabet, and for 13 months in the case of the Applicant Skeldon (from 1 December 1998 to 1 January 2000).

Furthermore, the Secretary-General informed the two Applicants in separate letters dated 10 July 2000 that he did not accept the decisions of the Joint Appeals

Board but would grant them three months' salary by way of compensation for the four years' delay while their cases were being dealt with:

> "In light of the above considerations, the Secretary-General cannot accept the Board's recommendation for compensation. However, taking into account the totality of circumstances in this case, **the Secretary-General agrees with the Board that the Administration was obligated to find a timely solution to the discrepancy between the level of the functions and the budgetary level of the post**. Acknowledging the delay in resolving your case, he has decided that you should be compensated in the amount of three months net base salary" (emphasis added by the Tribunal).

The Tribunal does not consider this meagre pittance to be fair compensation for the manner in which the two Applicants were treated over a period of several years.

XVI. The Tribunal will next turn to the promotion process which took place or, to put it more accurately, the process of non-promotion which occurred. The Tribunal has always maintained that there is no automatic promotion from one grade to another, but it nonetheless remains true that the increasingly frequent and systematic attitude of the Administration, which classifies a post at the level corresponding to the duties and responsibilities the post entails and which then, for years, and even for almost two decades as in the present case, does not implement its own classification for budgetary reasons and makes that an excuse to refuse promotion, is not acceptable since it strikes at the right of every staff member to career development in accordance with his or her rights and responsibilities.

There is, on the one hand, the "virtual classification", which corresponds to the work performed by the incumbent of the post, and on the other hand, the "actual classification", which is lower and corresponds to the salary paid to the incumbent of the post. This discrepancy, when it is of limited duration, is frequently corrected by a special post allowance as provided in staff rule 103.11:

> "(a) Staff members shall be expected to assume temporarily, as a normal part of their customary work and without extra compensation, the duties and responsibilities of higher level posts.
>
> "(b) Without prejudice to the principle that promotion under staff rule 104.14 shall be the normal means of recognizing increased responsibilities and demonstrated ability, a staff member who is called upon to assume the full duties and responsibilities of a post at a clearly recognizable higher level than his or her own for a temporary period exceeding three months may, in

exceptional cases, be granted a non-pensionable special post allowance from the beginning of the fourth month of service at the higher level."

It is clear from this text that the Staff Rules regard it as an exceptional and temporary situation for a staff member to assume the duties of a higher post than his or her own and that such an arrangement cannot become a standard part of the conditions of service.

XVII. Having stated these general principles, the Tribunal will review the two instant cases. The Tribunal recalls first that officials are supposed to be eligible for promotion after a certain period of time. In circular ST/IC/1993/66 of 2 December 1993 concerning promotions, the following criteria were set out for promotion from one category to another:

"The established requirement of minimum seniority in grade for staff in the Professional category and above is as follows:

P-1 to P-2 — Two years

P-2 to P-3 — Three years

P-3 to P-4 — Three years

P-4 to P-5 — Five years

P-5 to D-1 — Five years."

The Applicant Sabet, who was at the P-4 level from 1 March 1991, would therefore have been eligible for consideration for promotion to the P-5 level with effect from 1 March 1996, and the Tribunal considers that she effectively lost her chance of being so considered. Of course, if her career had developed with a promotion to the P-5 level on 1 March 1996 she would have been eligible to be considered for promotion. The situation in which she finds herself at the present time bears little relation to that as she has been at the P-5 level since May 2000, currently with only three years seniority.

Similarly, the Applicant Skeldon, who was at the P-3 level from 1 December 1995, would therefore have been eligible for consideration for promotion to the P-4 level with effect from 1 December 1998, and the Tribunal considers that she effectively lost her chance being so considered. Of course, if her career had developed with a promotion to the P-4 level on 1 December 1998 she would have been eligible to be considered for promotion to the P-5 level with effect from 1 December 2003. The situation in which she finds herself at the present time bears little relation to that as she took early retirement at the P-4 level.

The Administration has never disputed the fact that the two Applicants were performing duties corresponding to their post descriptions. Moreover, it appears from a study of their personnel files, and this fact too has never been contested by the Administration, that both Applicants were excellent staff members of the United Nations and gave full satisfaction in the editing service in which they worked. It is not disputed that the Applicant Sabet, during the period under consideration, was rated as "Excellent" and that the evaluation of the Applicant Skeldon stated that she "(c)onsistently exceeds performance expectations".

There was therefore no justification for the non-promotion of the two Applicants other than the laxity of the Administration in dealing with the classification of their posts. The Tribunal sees proof of this in the fact that, as soon as the classification of their posts was finalized on 1 May 2000, they were both promoted immediately. Moreover, the Administration paid them a special post allowance with effect from 1 January 2000 which is equivalent financially to predating their promotion by four months.

The Tribunal considers that by not promoting the two Applicants as they were entitled to expect, the Administration violated the principle of equality of treatment of staff members with identical duties and responsibilities.

XVIII. Furthermore, the Tribunal notes that not only were the careers of the Applicants subjected to incomprehensible delays, but also that the same applied in the handling of the claims for more satisfactory career development. The Tribunal thus considered the administrative appeals procedure. The Applicants initiated the appeals procedure before the Joint Appeals Board in 1997: the Board, however, only took its decision on 5 February 2001, in other words four years later. In addition, the Applicants had to demand the transmission of the report of the Joint Appeals Board as it was not forwarded to them in timely fashion.

XIX. The Tribunal strongly condemns this accumulation of delays in the present case. It recalls that a significant delay is in itself an infringement of the conditions of service of United Nations officials as it already stated in *MacMillan-Nihlén* (Judgement No. 880 (1998), para. VI):

> "The Applicant does not have to show that she suffered specific damage as a result of the successive delay. As the Tribunal has stated, an inordinate delay 'not only adversely affects the administration of justice but on occasions can

inflict unnecessary anxiety and suffering to an Applicant'" (cf. Judgements No. 353, *El Bolkany* (1985) and No. 414, *Apete* (1988).

XX. In addition, the Tribunal states that in the present case, the Applicants suffered considerably from all these delays. Merely to restore retroactively the situation that should have been that of the two Applicants when they worked at the United Nations cannot enable the two Applicants to relive all those years during which they were deprived of their proper status. Indeed, they consider that they have suffered more or less permanent damage as a result of the discrepancy between the grade that ought to have been accorded to them and the salary paid to them which corresponded to a lower grade. Undoubtedly, the fact that, year after year, they were at a level lower than that corresponding to the description of the duties performed is far from satisfactory. This is what the two Applicants explained in their applications, asking to be compensated for the numerous disadvantages arising from the non-recognition of their work in the service of the United Nations which they describe as follows:

"(i) The official silence over the years, on their several enquiries, (ii) the inordinate stalling and delay in considering their cases, and (iii) the irreparable action placed the Applicants in an inequitable situation in which their standing and authority in the Organization were undermined, they were denied career opportunities and training open to other staff at the classified levels of the subject posts, and they were denied compensation commensurate with their titles, job descriptions and the duties and responsibilities of their posts for a period of more than nine years in Ms. Sabet's case and four and half years in Ms. Skeldon's case."

They had previously drawn the attention of the Administration to these daily infringements of their conditions of service. For example, the Applicant Sabet explained in a letter of 28 November 1996 all the adverse consequences of the situation in which she found herself.

"The non-implementation of the classification of these posts through the failure to budget them at their appropriate level has had a number of consequences. It has diminished the career prospects of editorial staff in the United Nations in contradistinction to the decision of the General Assembly, in its resolution 35/225 of 17 December 1980 on the job classification and career development of language staff, that 'translators, interpreters, verbatim reporters, editors, copy-preparers and proof-readers [should] benefit from the reclassification measures'. It has resulted in functional discontinuity in the staffing table of the Editorial Services Section since the range of grade levels in the Section does not accurately reflect the increasingly complex and specialized nature of the assignments performed. It has led to inequitable treatment of staff serving on these posts; despite performing their duties and responsibilities at the higher classified level of the posts, the Organization has

> remunerated them at the lower budgeted level. It has impaired the Section's ability to attract and retain qualified editors, and the resulting chronic shortage of the appropriate expertise has undermined the ability of ESCAP to exercise effective oversight of its documentation and publication."

Similarly, the Applicant Skeldon wrote a letter to the Administration on 4 August 2000 explaining that she preferred to resign in view of the innumerable difficulties besetting her career development:

> "I have informed the Chief of Administration that I do not wish to continue working for the Organization after my present contract finishes on 30 November 2000, although I was not due to retire until January 2002 ... There has been a long history of bureaucratic bungling associated with the two posts in the Section: the Chief's and mine ... For five full years ... I will have been carrying out the functions of a higher-level post with remuneration at a lower level ... I am no longer willing to accept the conditions of work that I have described above."

XXI. In summary, the Tribunal considers that by not carrying through the procedure for the classification of the posts of the two Applicants in the Editorial Services Section of ESCAP, and the promotion procedure, the Administration violated the entitlements of members of the staff of the United Nations under the Staff Rules and violated the principle of equality of treatment of staff members with identical rights and duties. The Tribunal considers that the Administration has a duty to reconstitute their careers retroactively and to promote them as from the respective dates on which they had served the minimum time in the grades in which they found themselves as though the posts had actually been classified at the proper time, while compensating them in order to take account of the particularly unacceptable conditions which attended the career development of the two Applicants.

XXII. For the above reasons, the Tribunal:

1. Decides, in the case of the Applicant Sabet, that the Administration must restore the situation that would have existed if she had been promoted to grade P-5 with effect from 1 March 1996 at which date she had been at grade P-4 for five years, giving her compensation equivalent to the salary and other benefits she ought to have received up to 1 January 2000 on which date the Applicant Sabet was finally paid a salary equivalent to grade P-5;

2. Decides, in the case of the Applicant Skeldon, that the Administration must restore the situation that would have existed if she had been promoted to grade P-4 with effect from 1 December 1998 at which date she had been at grade P-3 for three years, giving her compensation equivalent to the salary and other benefits she

ought to have received up to 1 January 2000 on which date the Applicant Skeldon was finally paid a salary equivalent to grade P-4;

3. Orders also, for the Applicant Sabet, the payment of one year's salary for the incoherent and inequitable development of her career for nearly 10 years and, for the Applicant Skeldon, the payment of six months' net salary for the incoherent and inequitable development of her career for nearly five years;

4. Rejects all other pleas.

(Signatures)

Julio **Barboza**
President

Omer Yousif **Bireedo**
Member

Brigitte **Stern**
Member

Geneva, 25 July 2003

Maritza **Struyvenberg**
Secretary